IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 246 OF 2006.

Shri Kalidas Mortu Gad,
major of age, son of late
Mortu Shankar Gad,
residing at House No. 487/8,
Chodanwada, Salai,
Salvador do Mundo, Bardez,
Goa. .... Petitioner.

Versus

Shri Ashok Mortu Gad,
maor of age, son of
late Mortu Shankar Gad,
residing at House No. 487/8,
Chodanwada, Salai,
Salvador do Mundo, Bardez, Goa. .... Respondent.

Shri J.P. Mulgaonkar, Advocate for the Petitioner.

Shri J. Godinho, Advocate for the Respondent.

CORAM: R.M.S. KHANDEPARKAR, J.

DATE: 6th SEPTEMBER, 2006.

ORAL JUDGMENT:

Heard. Rule. By consent Rule made returnable forthwith.

2. The petitioner challenges the Order dated 3.10.2005 passed by the trial Court dismissing the application for amendment on the ground that the same was barred by the Law of Limitation. The trial Court has observed in

the impugned order that the cause of action arose in November, 1998, while the amendment was sought for in the year 2005 and the relief sought to be included by way of amendment is not in the nature of restoration of possession, but in the nature of mandatory injunction and therefore the period of limitation is of three years and not 12 years as it was sought to be argued before the trial Court.

3. As regards the original plaint is concerned, undisputedly the same was not only for permanent injunction but also for mandatory injunction and prayer (b) therein reads thus :-

" For a Mandatory injunction ordering the defendant to demolish the construction in respect of the suit house already done by him "

4. Apparently the petitioner/plaintiff had already prayed for mandatory injunction in respect of the construction done in relation to the suit house. By way of proposed amendment to the pleadings, the description as regards the alleged construction is also in relation to the suit house. Obviously, therefore, the prayer for demolition of the alleged illegal construction in respect of the suit house was already made at the time of filing of the plaint. Being so, merely because pleadings of clarificatory nature in relation to the alleged offending construction were sought to be introduced by way of amendment, there was no need of introducing

additional relief for mandatory inunction. Undoubtedly, therefore, the trial Court was justified in dismissing the amended prayer clause. However, the total rejection of the application was clearly unwarranted and the order in that regard cannot be sustained. Once the proposed amendment excluding the prayer clause was of clarificatory nature in relation to the alleged offending construction, and the prayer in relation to the said construction is already made in the plaint, there was no justification for the trial Court to reject the said amendment on the ground of bar of limitation. Order to that effect cannot be sustained and is liable to be set aside.

5. In the result, therefore, the petition partly succeeds. The impugned order to the extent it rejects the amendment to the prayer clause, does not require any interference. However, the order in relation to rejection of application for amendment to the pleadings, the same cannot be sustained and is quashed and set aside. The amendment to the pleadings to be carried out within two weeks on receipt of the writ of this Court. Rule is made absolute accordingly, with no order as to costs.

R. M. S. KHANDEPARKAR, J.

sl.